United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To be argued by
STANLEY ZINNER

74-1118
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UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

Docket No. 73 CR 586

UNITED STATES OF AMERICA,

Appellee,

-against-

HAROLD SANCHEZ,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

DEFENDANT-APPELLANT'S BRIEF

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STATEMENT OF THE ISSUE PRESENTED

WHETHER THE FAILURE OF THE TRIAL COURT TO CHARGE AS REQUESTED BY THE DEFENDANT CONSTITUTED REVERSIBLE ERROR?

STATEMENT OF THE CASE

1. The defendant, Harold Sanchez, was indicted in the United States District Court for the Eastern District of New York by indictment filed June 15, 1973. He was charged with Rape (18 U.S.C. 2031), Assault with Intent to Rape (18 U.S.C. 113), Robbery (18 U.S.C. 2111), and Theft (18 U.S.C. 661).

2. A Wade-Simmons Identification Hearing was conducted on September 17, 1973, before the Hon. Edward Heaher. The motion was denied.

3. The trial of the aforementioned charges commenced on September 18, 1973, and terminated with a verdict of guilty on all four counts on September 26, 1973.

4. On December 14, 1973, the defendant, Harold Sanchez, was sentence pursuant to 18 U.S.C. 4208(b) to a ninety day period of observation under the custody of the Attorney General.

5. The Notice of Appeal was duly filed on December 19, 1973.

6. As of the date of filing this brief, the defendant Harold Sanchez is still in the custody of the Attorney General.

FACTS

Linda Jean Wilson, the wife of an Army Sargeant stationed at Fort Hamilton, testified that on March 28, 1972, while at her home, a man asked permission to enter in order to check the serial number on her refrigerator (TR 202-204). * The male was described as Negro, 28-30 years of age, 6 feet tall, Afro haircut, mustache with pit marks on his face (TR 204-208). He had a cane and some metal

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* All page references are to the Trial Record.

on the bottom of his shoe. After some time, Linda Wilson asked that he remove bedroom furniture which had originally come from the Fort Hamilton Family Housing Unit, from the apartment (208-212). In so doing, he held onto a portion of the disassembled bed (TR 214). Shortly thereafter he grabbed Linda Wilson, held a knife to her throat, partially undressed her, and raped her on the bed (TR 214-218). Afterwards he tied her up and made off with a television, a camera and a couple of dollars (TR 219-224).

Linda Wilson ultimately untied herself, went to a neighbors home and called for assistance. The Military Police took her to the hospital where a physical examination and vaginal smear was conducted (TR 222-227).

The Federal Bureau of Investigation dusted the Wilson home for fingerprints and also secured a bedspread with seminal stains (TR 359-370, 384). The fingerprints and bedspread were sent to the FBI Laboratory for testing (384).

Prior to correctly identifying the defendant in a photographic display and a line-up, Linda Wilson selected the photograph of a man who resembled her attacker. The man was identified by the FBI as Joseph Richardson whose Criminal Identification Record indicated he had a short right leg (TR 388).

On cross-examination Linda Wilson thought there were more than 30 pit marks in her assailant's face (TR249) but upon closely examining the defendant's face she did not see the pit marks (TR 260).

Wendy Walker, a 15 year old, testified that she saw a male, Negro with Afro hair, a cane, bushy eyebrows that met in the middle, no mustache, some metal on his feet, exiting the elevator with a television. There was nothing unusual about the way the man walked (TR 311-315). On cross-examination she admitted that she had viewed the male negro for a period of only a few seconds and that she was uncertain as to whether his eyebrows met in the middle (TR 323-329). On viewing a line-up in which the defendant Harold Sanchez participated, she failed to pick him out, but did select someone else in the line-up (TR 340).

Douglas Cole, a fingerprint expert employed by the FBI, testified that a latent print lifted from a disassembled bed taken from the Wilson apartment was identical with the defendant Harold Sanchez's fingerprint (TR 408). He further testified that many things affect the duration of a print but that it was possible, assuming favorable circumstances, for a print to last 10 or 20 years (TR 410) but that there was no test which could be conducted to determine the age of the print (TR 418).

The defense called Thomas Kelleher, a forensic serologist employed by the FBI Laboratory, who conducted blood grouping tests on the seminal stains found on the bedspread (TR 426-431). The seminal stains were found to contain the type A blood group substance (TR 434). It was stipulated that the defendant Harold Sanchez had blood group O positive (TR 434). Cross examination elicited the opinion that the above finding did not eliminate the possibility of defendant Harold Sanchez being the rapist. The comingling of the vaginal secretions from Linda Wilson, who had group A blood, with that of an O positive assailant could account for the presence of the A substance in the seminal stain; this is so inasmuch as an O blood group indicates the absence of the A substance (TR 434-436).

Harold Sanchez testified that he was injured by accident in Viet Nam on January 6, 1971, and was permanently disabled. He was shot in the right leg, underwent several operations and a long leg brace was placed on his leg (TR 448-451).

During his first tour with the Army he was stationed at Fort Hamilton and lived in the same building as Linda Wilson, only two years before (TR 439). He also had furniture from the Family Housing (TR 439-441). In addition he had visited several apartments while living there and had at one time moved furniture for Family Housing over a period of a two day detail (TR 440, 442).

Three months prior to the date of the rape, the cast was removed from his leg and the brace was placed on. Prior to the rape and subsequent thereto he regularly visited a clinic adjacent to Fort Hamilton (TR 451-455). He did not rape Linda Wilson and did not steal anything from her (TR 473).

On rebuttal, Linda Wilson testified that when she received her bedroom furniture from Family Housing she and her husband cleaned the set with a broom and rag, but she admitted that it was possible to have missed a portion of the bed (TR 529-531).

On the second day of deliberation the jury found Harold Sanchez guilty on all counts.

POINT I

THE FAILURE OF THE TRIAL COURT TO CHARGE ON A THEORY OF THE DEFENSE DEPRIVED DEFENDANT OF A FAIR TRIAL

The crucial issue in the instant case was one of identification: It was not contested that the complainant, Linda Jean Wilson, was raped. In consideration of that defense the defendant called Thomas F. Kelleher, Jr., a special agent with the FBI assigned to the FBI laboratory in Washington, D.C. (TR 426). Mr. Kelleher was qualified as an expert in forensic serology (TR 426-429). His testimony in substance was that:

1. Blood group can be determined by testing a seminal stain (TR 433).

2. By determining the blood group of a seminal stain it is possible to eliminate certain individuals as the depositors of the stain (TR 433).

3. He conducted blood grouping tests on the semen stains found on the complainant's bedspread (TR 434).

4. The A blood group substance in the seminal stains could not possibly have come from the defendant (TR 434).

5. He was unable to segregate male fluids from female fluids and consequently the comingling of the defendant's seminal

fluid with the complainant's vaginal fluids could have accounted for the fact that the A blood grouping was found in the stain on the bedspread (TR 435).

6. The fact that the A blood group substance was identified did not eliminate the possibility that O blood group semen was present in the tested stain (TR 436).

The findings of the serologist therefore was inconclusive in eliminating the defendant Harold Sanchez as the rapist. The one clear statement that was made, however, was that given an unadulterated seminal stain, unadulterated in that it was not comingled with vaginal fuild, certain individuals could be eliminated from consideration (TR 432-435). Whether or not the serologist performed a blood grouping test on an unadulterated seminal stain was an issue of fact for the jury to decide. There was sufficient evidence adduced at trial to warrant a logical inference that the rapist deposited semen on the bedspread as he rose from the complainant which was not comingled with vaginal fluid.

"Q There came a time when this attacker withdrew; am I right?

A Yes.

Q By that I mean he withdrew his penis from your vagina?

A Yes.

Q Did he place any cloth next to your vagina?

A No.

Q Did you see him get up off the bed?

A I don't remember.

Q Did you see whether he held any cloth or covering, whether he held his hand over his penis as he got up?

A I don't know.

Q Did you see any semenal fluid coming from his penis?

A I didn't even look. (TR 276-277)

It is well within the realm of possibility that as the rapist withdrew he deposited unadulterated seminal drippings on the bedspread. This being the case, it was possible for the jury to conclude that since the defendant had O blood (TR 434), he could not possibly have been the rapist.

The fact that the serological issue was pressed so vigorously throughout the course of the trial clearly indicates one theory of the defense. Considering the fact that the prosecution produced an independent identification witness, and a fingerprint expert, the serological evidence was probative on the identification issue.

The following requests to charge were proferred to the Court:

1. If you find from the evidence that there existed a seminal stain which was not commingled or mixed with Linda Wilson's

body fluid, and which was tested for blood group, you must find the defendant not guilty.

2. If you find from the evidence that a blood grouping test was performed on a seminal stain produced by the rapist, which stain was unaffected by the complainant's body fluid, you must find the defendant not guilty.

3. If you find from the evidence that a blood grouping test was performed on a pure seminal stain produced by the rapist, you must find the defendant not guilty.

Pursuant to Rule 30 of the Rules of Criminal Procedure appropriate objection was made to the Courts refusal to charge as requested by the defendant (TR 646). Counsel argued the issues raised by the requested instructions at length (TR 550-559) and consequently there was no need to reargue the same points after excepting to the Courts refusal to charge as requested.

The state of the law regarding requested instructions in a criminal case is clear. It is to the effect that it is reversible error for the trial court to refuse to present adequately a defendant's theory of defense. See generally Sally v. U.S., 353 F 2d 897; Speers v. U.S. 387 F 2d 698; U.S. v. Blane, 375 F 2d 249; Marson v. U.S., 203 F 2d 904; Levine v. U.S., 104 U.S. App. D.C. 281, 261 F 2d 747.

In Levine v. U.S., supra, at page 748, it was expressly held that the rule "applies as well to situations where special facts present an evidentiary theory which if believed defeats the factual theory of the prosecution." This is precisely the situation in the instant case.

Strauss v. U.S. 376 F 2d 416, cited with approval in Gay v. U.S., 408 F 2d 923 held that:

> "where the defendant's proposed charge presents, when properly framed, a valid defense, and where there has been some evidence relevant to that defense adduced at trial, [the] charges must be given on that defense." See also Barker v. U.S. 310 F 2d 924.

The trial court in the case at bar felt that there was evidence adduced at trial regarding the serological tests which had a bearing on the issue of identification. At TR 558 the Court stated:

> ...the core issue in this case as I see it is identification.
>
> If there is any evidence, it may have a bearing on that subject. I think the Court should not strike out, but on the other hand, I don't believe the Court should conclude from it as a matter of law that it exonerates this defendant, because that's what you are asking me to do.

MR. ZINNER: Yes.

THE COURT: So I'm going to deny that motion and permit the jury to consider that evidence along with other evidence in the case for whatever its worth. (TR 558)

Regrettably, the charge of the Court was not sufficiently detailed to preclude the necessity of the requested instructions. The following excerpts contain the sole references to the serological theory of defense:

> "Aside from that, a Government witness was produced here, Mr. Kellerher, the serologist from the Federal Bureau of Investigation, who gave certain evidence based on -- I believe he called them seminal stains, or body fluid stains found on a certain bed cover which had been removed from the bed where the act described by Mrs. Wilson took place.
>
> All this is grist for you to decide to weigh and evaluate and form, as I say, the ultimate determination you have to make with respect to the guilt or innocence of this particular defendant on trial (TR 638).

and tangentially:

> Now, as I said before, you have heard here, in addition to Mrs. Wilson and the defendant, the fingerprint expert, the serologist, people who, of course, were not present at the time in question. However, they are men of special training and knowledge, and by virtue of that -- of the law, they are permitted to tell you, the jury, what their conclusion and opinions are with respect to certain facts. (TR 640)

The defense contends that these instructions are insufficient to properly lay before the jury the defendant's theory of defense. Directly in point is the case of U. S. v. Indian Trailer Corp., 226 F 2d 595 wherein it was held that a defendant ordinarily is "entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insuffient, inconsistent, or of doubtful credibility". Cited with approval in U. S. v. Lehman, 468 F 2d 93.

In sum, therefore, the sole testimony or evidence produced at the trial beside the defendant's testimony, was not given appropriate weight. This is of particular importance because the crime alleged was a capital offense. The requested instructions

clarified the issues to be resolved and the refusal of the Court to charge as requested deprived the defendant of a fair trial.

The judgment should be reversed.

CONCLUSION

The Trial Court's refusal to charge as requested was error. The judgment must be reversed.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

73 CR 586

-against-

HAROLD SANCHEZ,

Defendant.

----------X

STATE OF NEW YORK)
) SS.:
COUNTY OF BRONX)

STANLEY ZINNER, being duly sworn, deposes and says: that deponent is not a party to the action, is over 18 years of age and resides at Bronx, New York. That on the 25th day of February, 1974, at 225 Cadman Plaza East, Brooklyn, New York, deponent served the within Defendant-Appellant's Brief upon Joan O'Brien, the Assistant U.S. Attorney herein, by delivering a true copy thereof to her personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Assistant U.S. Attorney therein.

STANLEY ZINNER

Sworn to before me this
28th day of February, 1974.

JOSEPH SEIJAS
Notary Public, State of New York
No. 03-3588195
Qualified in Bronx County
Term Expires March 30, 19__